

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2010-A-0026
AMOS STEWART,	:	5/27/11
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2009 CR 137.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Ariana E. Tarighati, Law Offices of Ariana E. Tarighati, L.P.A., 34 South Chestnut Street, #100, Jefferson, OH 44047-1092 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a final judgment of the Ashtabula County Court of Common Pleas. Appellant, Amos Stewart, contests both the validity of his guilty plea and the constitutionality of his designation as a Tier III sexual offender. Upon reviewing the trial record and the relevant case law, this court concludes that he has failed to demonstrate any error in the trial court's disposition of the matter.

{¶2} In June 2009, the Ashtabula County Grand Jury indicted appellant on four

counts of rape and six counts of sexual battery. Essentially, the indictment alleged that, over a thirteen year period, appellant engaged in various forms of sexual conduct with his minor daughter. Under two of the “sexual battery” counts, the state asserted that the sexual conduct occurred with a victim below the age of thirteen; as a result, those counts charged appellant with second-degree felonies, pursuant to R.C. 2907.03. As to the remaining four counts of sexual battery, the state asserted that the offenses took place after the victim was thirteen, thereby rendering those charges third-degree felonies under the same statute.

{¶3} After appellant entered an initial plea of not guilty to all ten counts, he moved the trial court for a declaration of whether he was competent to stand trial. Once the required psychiatric examinations were performed, appellant was found to be competent and sane. Accordingly, his jury trial was scheduled to proceed in February 2010.

{¶4} Approximately ten days prior to the scheduled trial date, appellant and the state were able to negotiate an acceptable plea bargain. As part of the express terms of the bargain, appellant agreed to enter a plea of guilty to two counts of second-degree sexual battery and two counts of third-degree sexual battery. In return, the state agreed to dismiss the remaining six counts of the indictment, including the four counts of rape.

{¶5} Consistent with the plea bargain, appellant executed a written statement of his guilty plea, which was filed with the trial court on January 29, 2010. On that same date, the trial court conducted an oral hearing on the new plea. During its colloquy with appellant, the trial court specifically discussed the various ramifications of entering such a plea, including the possible sanctions. In addition, the court explained the general

constitutional rights that appellant was waiving as a result of pleading guilty. In light of appellant's responses to the various questions, the trial court accepted the guilty plea at the conclusion of the hearing.

{¶6} After ordering a pre-sentencing report and holding a separate sentencing hearing, the trial court rendered its final judgment in May 2010. The court ordered appellant to serve an eight-year term on each of the two second-degree sexual battery counts, and a term of five years on each of the two third-degree sexual battery counts. The trial court further ordered that all four terms were to be served concurrently, for an aggregate sentence of eight years. Finally, the trial court expressly found that appellant must be designated a Tier III sexual offender under R.C. Chapter 2950.

{¶7} In appealing the foregoing judgment to this court, appellant has asserted the following two assignments of error:

{¶8} “[1.] Application of S.B. 10 to classify appellant as a Tier III offender violates the ex post facto clause of the United States Constitution and the retroactive laws clause of the Ohio Constitution, the separation of powers doctrine of the federal and state constitutions and the appellant's rights to substantive and procedural due process as guaranteed by the federal and state constitutions.

{¶9} “[2.] An appellant's plea is not knowingly, voluntarily and intelligently made when the trial court fails to advise him of all of the trial rights he is waiving by entering a plea of guilty.”

{¶10} Under his first assignment, appellant contests the basic constitutionality of the statutory scheme under which he was classified a Tier III sexual offender. Because appellant's conviction on the four offenses became final in May 2010, the trial

court's "sexual offender" determination was pursuant to the version of R.C. Chapter 2950 which became effective in January 2008, commonly referred to as the Adam Walsh Act. Appellant submits that the procedure under the Adam Walsh Act, also known as Senate Bill 10, violated his constitutional rights in five different respects. In light of this, he also argues that any decision as to his status as a sexual offender should have been made under the prior version of R.C. Chapter 2950.

{¶11} Initially, this court would note that the Supreme Court of Ohio has already found certain aspects of the Adam Walsh Act to be unconstitutional. In *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, the court held that, to the extent that R.C. 2950.031 and 2950.032 allowed the executive branch to change the status of a sexual offender who has already been the subject of a judicial determination, the provisions of the new act violated the separation-of-powers doctrine. That is, the Supreme Court concluded that, once an offender's classification had been set through a judicial determination, the executive branch did not have the authority to "review" such a ruling based upon a new standard. *Id.* at paragraph three of the syllabus.

{¶12} However, the *Bodyke* analysis was specifically limited to those parts of the Adam Walsh Act involving the re-classification of a convicted offender; i.e., the Supreme Court did not strike down the entire new statutory scheme. Therefore, it has been held that *Bodyke* has no application when a trial court's initial determination concerning the defendant's classification was made after January 1, 2008, the effective date of the new act. *State v. Williams*, 2d Dist. No. 22574, 2010-Ohio-3537, at ¶14. In turn, given the limited scope of *Bodyke*, Ohio appellate courts have continued to follow their prior legal analyses regarding the general constitutionality of the Adam Walsh Act, as applied to a

defendant who was not sentenced until after the act's effective date. See, e.g., *State v. Cassell*, 2d Dist. No. 09CA0064, 2011-Ohio-23.

{¶13} In *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, the appeal stemmed from the trial court's initial decision to classify the defendant a Tier III offender under the new classification scheme. In contending that the governing provisions of the Adam Walsh Act should be declared unconstitutional, the *Swank* defendant raised the same five arguments asserted by appellant in the instant appeal; i.e., the constitutional challenges raised issues in ex post facto, retroactivity, separation of powers, procedural due process, and substantive due process. In a lengthy legal analysis, the *Swank* court rejected all five arguments and upheld the constitutionality of the new act as applied to an initial "classification" determination based upon a new conviction.

{¶14} Although our opinion in *Swank* has been appealed to the Supreme Court of Ohio and is currently pending, it still remains binding precedent within our jurisdiction at this time. Moreover, our review of appellant's arguments in the present matter indicates that he has failed to assert any new points which would warrant reconsideration of our prior analysis. Thus, pursuant to *Swank*, this court concludes that appellant has not demonstrated that the Adam Walsh Act is unconstitutional as applied to him. For this reason, appellant's first assignment of error is without merit.

{¶15} Under his second assignment, appellant submits that his conviction on the four counts of sexual battery should be declared invalid because, prior to accepting his guilty plea, the trial court did not inform him of every constitutional right he would waive under that new plea. Specifically, appellant maintains that the guilty plea was not made knowingly or intelligently because the trial court never determined whether he realized

that he would be waiving his right to testify at trial. In support of this point, he refers to the fact that a defendant's ability to testify on his own behalf has been recognized as a fundamental right.

{¶16} Under Ohio law, a trial court cannot accept a criminal defendant's plea of guilty until that court has been persuaded that the defendant understands the nature of the rights he will not be able to invoke as a consequence of the plea. *State v. Gibson*, 11th Dist. No. 2005-P-0066, 2006-Ohio-4182, at ¶13, quoting *State v. Porterfield*, 11th Dist. No. 2002-T-0045, 2004-Ohio-520, at ¶21. This court has indicated that the rights at issue in a "guilty plea" determination can be divided into two categories: constitutional and non-constitutional. *Id.* As to the first of the categories, the Supreme Court of Ohio has provided a list of four constitutional rights that must be discussed with a defendant before he can obtain the requisite understanding:

{¶17} "Prior to accepting a guilty plea from a criminal defendant, the trial court must inform the defendant that he is waiving his privilege against compulsory self-incrimination, his right to jury trial, his right to confront his accusers, and his right of compulsory process of witnesses. (*Boykin v. Alabama*, 395 U.S. 238, followed.)" *State v. Ballard* (1981), 66 Ohio St.2d 473, paragraph one of the syllabus.

{¶18} Subsequent to *Ballard*, Ohio courts have recognized one additional right that the defendant must understand: the constitutional right to require the state to prove each element of the offense beyond a reasonable doubt. See *State v. Rowbotham*, 173 Ohio App.3d 642, 2007-Ohio-6227, at ¶9. Consistent with the foregoing basic case law, Crim.R. 11(C)(2)(c) states that a trial court is not permitted to accept a guilty plea prior to addressing the defendant personally and doing the following:

{¶19} “(c) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant’s favor, and to require the state to prove the defendant’s guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.”

{¶20} In considering the language of the foregoing quote, this court would note that Crim.R. 11(C)(2)(c) does not contain any “catchall” provision indicating that the trial court is obligated to inform the defendant of other constitutional rights pertaining to the procedure in a criminal trial. Instead, the wording of the rule supports the conclusion that the list of cited rights was intended to be exclusive. Similarly, our review of *Ballard* and the other governing case law shows no reference to the need to explain any other constitutional rights to the defendant.

{¶21} In light of these points, this court has previously held that the acceptance of a guilty plea will not be reversed on the grounds that the trial court failed to inform the defendant of his basic right to testify on his own behalf at trial. *State v. Burdette*, 11th Dist. No. 2009-A-0021, 2009-Ohio-5633, at ¶60. In other words, it is not necessary for a trial court to expressly address the right to testify in order for a guilty plea to be made knowingly and intelligently. See, also, *State v. Eckles*, 173 Ohio App.3d 606, 2007-Ohio-6220, at ¶40-41, citing *State v. Wangul*, 8th Dist. No. 84698, 2005-Ohio-1175.

{¶22} As a general proposition, this court does not contest appellant’s assertion that a defendant’s right to testify at a criminal trial constitutes a fundamental right under Ohio jurisprudence. Although he has cited a number of state and federal cases in

support of that assertion, he has failed to cite any Ohio decision that has interpreted Crim.R. 11(C)(2)(c) to require a discussion of that specific right as part of the “guilty plea” colloquy. Instead, in relation to the defendant’s possible testimony at trial, the rule and case law only mandate that the defendant be informed of his constitutional right against self-incrimination.

{¶23} In the instant matter, our review of the transcript of the plea hearing shows that the trial court’s colloquy with appellant included an explanation that he could not be compelled to testify against himself at trial. The transcript further shows that a similar explanation was given as to the other four rights cited in Crim.R. 11(C)(2)(c). Moreover, at the conclusion of each explanation, appellant stated that he understood that he was waiving those rights by pleading guilty. Therefore, since the record demonstrates that the trial court strictly complied with the requirements of the rule, that court did not err in concluding that appellant was acting knowingly and intelligently in regard to the waiver of his constitutional rights. For this reason, the second assignment in this appeal also is without merit.

{¶24} In light of our disposition of the two assignments of error, it is the order of this court that the judgment of the trial court is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.